

EU-Canada Comprehensive Economic and Trade Agreement

SUMMARY

EU-Canada negotiations for a Comprehensive Economic and Trade Agreement (CETA) were declared concluded in September 2014. Except for a few sensitive agricultural products, CETA would remove practically all tariffs on goods exchanged between the two partners, and create important new market opportunities in, among others, financial services, telecommunications, energy and maritime transport, while reserving the parties' right to regulate their internal public affairs. Canada would substantially open up its public procurement, at both federal and sub-federal level, thereby eliminating a major asymmetry in access to each other's public procurement markets.

The consolidated CETA text is currently undergoing legal-linguistic review. Once this 'legal scrubbing' and the translation into all official EU languages are completed, the Commission can submit it to the Council and the European Parliament for approval. It is still to be decided whether the agreement in its entirety falls under exclusive competence of the European Union or would also touch upon Member States' competences. In the latter case, ratification by the Member States would also be necessary for the agreement to come into force.

CETA brings forward a number of innovations to reform and reshape investment protection provisions in general and the investor-state-dispute settlement (ISDS) mechanism in particular. Nevertheless, persistent opposition to investment protection, and ISDS in particular, has given rise to proposals to incorporate (elements of) the new investment court system (ICS) into CETA. The Commission is reportedly not pressing for including its entire ICS proposal into CETA; however, it intends to 'fine-tune' the agreement within the process of legal scrubbing. Working towards including (elements of) the ICS system into CETA could then be envisaged via the use of review clauses.



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Background

EU-Canada negotiations for a Comprehensive Economic and Trade Agreement ([CETA](#)) started in May 2009 and were declared concluded at the EU-Canada Summit on 26 September 2014 by former Canadian Prime Minister, Stephen Harper, former European Commission President, José Manuel Barroso, and former European Council President, Herman Van Rompuy. The agreement's overall aim is to increase flows of goods, services and investment to the benefit of both partners.

For the European Union, CETA represents the first comprehensive economic agreement with a highly industrialised Western economy, which shares a similar set of values and a similar tradition of the role of government in the economy. A comprehensive trade and investment agreement with Canada would overcome the current disadvantage, experienced by EU enterprises on the Canadian markets vis-à-vis US competitors, which benefit from the North American Free Trade Agreement (NAFTA).

For Canada, once ratified, CETA will be the most important agreement in terms of trade and investment volumes since NAFTA, and promises to lower its dependency on the US business cycle. Both the Canadian and the European Parliament have actively monitored the negotiations and voiced their ideas throughout the process, not least through the European Parliament [Resolution of 8 June 2011](#) on EU-Canada trade relations. Being a federal state, Canada has actively consulted with regional parliaments, [provinces](#), territories and local governments.

CETA impact

The [Sustainability Impact Assessment](#) carried out for the European Commission expects CETA to lead to overall gains in welfare, total exports, real GDP and wages in both Canada and the EU. For Canada, gains in exports are likely to stem from the removal of tariffs, while for the EU the removal of barriers to trade in services was found to be more important. Third countries are predicted to experience minor welfare losses, though the overall effect on their GDP is assessed as insignificant.

A [2008 joint study](#) by the European Commission and the Government of Canada estimated the annual real income gain to be approximately €11.6 billion for the EU and €8.2 billion for Canada (within seven years of implementation of an agreement). EU exports to Canada are expected to increase by 24.3% or €17 billion, while Canadian exports to the EU would increase by 20.6% or €8.6 billion. Liberalisation of trade in services is assessed to contribute substantially to the GDP gains (50% of the total gains for the EU, and 45.5% of the gains for Canada); the remaining gains are to come from the elimination of tariffs and from a reduction in trade costs thanks to lower non-tariff barriers. The Commission [has said](#) it is preparing an additional study on the economic effects of CETA taking into account the final outcome of the negotiations.

CETA's components

Except for a few sensitive agricultural products, the agreement would [remove practically](#) all tariffs on goods exchanged between the two partners, and create important new market opportunities in, among other areas, financial services, telecommunications, energy and maritime transport, while reserving the parties' right to regulate their internal public affairs. With CETA, Canada would substantially open up its public procurement at both federal and sub-federal level, thereby eliminating a

major asymmetry in access to each other's public procurement markets. The EU succeeded in having 145 European [Geographical Indications](#) (GIs) protected on the Canadian market. The parties also agreed that the list of protected GIs could be enlarged in the future. [Provisions on sustainable](#) development should ensure that trade and investment do not develop to the detriment of, but rather support, environmental protection and social development.

As for institutional provisions, the CETA Joint Committee, co-chaired by the Canadian Minister for International Trade and the EU Trade Commissioner, will assemble representatives from both partners, to 'supervise and facilitate the implementation and application' of the agreement and oversee 'the work of specialised committees and other bodies established under CETA' ([Chapter 30](#)). The Regulatory Cooperation Forum will build on the former Government of Canada–European Commission Framework on Regulatory Cooperation and Transparency, and explore ways to further enhance [regulatory cooperation](#) on a voluntary basis 'without limiting the ability of each Party to carry out its regulatory, legislative and policy activities' ([Chapter 26](#)). The Forum will [not be able](#) to change existing regulations or develop new legislation.

Dialogues and bilateral cooperation in the areas of biotechnology, trade in forest products and raw materials ([Chapter 29](#)), among others, will also be co-chaired by both parties. Although the European Commission [explains](#) that 'CETA does not affect EU restrictions on beef containing growth hormones or GMOs', [critical voices](#) fear that the [precautionary principle](#) prevailing in the EU might be watered down in the future under the influence of the different regulatory cooperation fora initiated by the CETA.

Is CETA a 'mixed' agreement?

It has not yet been decided whether the agreement in its entirety would fall under exclusive competence of the European Union or would also touch upon Member States' competences. In this latter case, ratification by the Member States would also be necessary for the agreement to come into force. When submitting CETA to the Council for signature, the Commission will need to decide whether to submit it as a 'mixed' or an 'EU-only' agreement.

Member States in the Committee of Permanent Representatives (Coreper) strongly [argued for](#) CETA to be a mixed agreement. [A letter](#) signed in June 2014 by 21 chairs of relevant committees in national parliaments to the European Commission also asks for CETA, and the Transatlantic Trade and Investment Partnership (TTIP), to be considered as a mixed agreement, since both 'contain provisions that concern policy areas which are within the competences of the Member States'. The [bi-annual report](#) (May 2015) of the Conference of Parliamentary Committees for Union Affairs of Parliaments of the EU (COSAC) May 2015 points in the same direction.

For the EU Free Trade Agreement with Singapore, the Commission decided to [request](#) the opinion of the Court of Justice of the EU (CJEU) on the competence of the EU to sign and conclude the agreement. The Commission asked which provisions of the agreement would fall under exclusive or shared EU competences and whether the agreement would contain provisions that fall under the exclusive competence of Member States. The response of the Court will clearly have implications for other trade agreements in the pipeline.

However, if the Commission is to tick to its plan to submit CETA to the Council and the European Parliament for approval [as early as possible in 2016](#), it will probably be

impossible to wait for the CJEU's opinion. Legal experts at the European Commission are currently examining the matter with the aim of finalising a proposal soon. At a recent [workshop on CETA](#) organised by the European Parliament's Committee on International Trade (INTA), the Commissioner argued that even if the Commission's legal service was to decide that CETA was of 'mixed' nature, discussions with the Council could arise over the legal appreciations behind that finding.

Next steps at EU level

At present, lawyers from the European Commission and the Canadian side are undertaking a legal review of the CETA text ('legal scrubbing') in order to ensure that the agreement is legally sound and that the agreement's various chapters are consistent with one another. The text will then be translated into all official languages of the EU. Once this is done, the Commission can make a formal proposal to the Council to [sign and conclude](#) the agreement. If, following its internal debate, the Council has taken the decision to do so, the Presidency designates a person (often the Commissioner for Trade) to formally sign the agreement.

After the deal has been signed by the two contracting parties, the Council forwards the agreement together with the draft decision for its conclusion to the European Parliament. The INTA Committee has nominated [Artis Pabriks](#) (EPP, Latvia) as [standing rapporteur](#) for matters concerning Canada. Once the proposal to approve the agreement has reached the European Parliament, the [consent procedure](#) can be launched, possibly accompanied by a parliamentary resolution. The agreement can only be concluded with the consent of the European Parliament.

When approving the proposal to sign the agreement, the Council can also decide to provisionally apply (parts of) the agreement (Article 218(5) [TFEU](#)). However, although the Treaties give the right to decide on provisional application to the Council, politically important trade agreements are usually not applied provisionally before the European Parliament has given its consent. Commissioner Malmström has [declared her support](#) for this practice. The question of provisional application prior to ratification would also depend on the agreement of the Canadian government, of course.

The new Canadian Government and CETA

The new Canadian Government under Justin Trudeau, who came into power following the [federal elections](#) of October 2015, supports the conclusion of CETA, negotiated under the former (Conservative) Prime Minister Stephen Harper. In 2013, when still in opposition, Justin Trudeau [declared](#) he was 'broadly supportive of CETA' given the Liberal Party's pro free-trade stance. As Prime Minister, he has [mandated](#) the new Canadian Minister of International Trade, [Chrystia Freeland](#), to develop strategies for the implementation of the agreement.

The CETA deal was not a central topic of the [electoral debate](#) in Canada. Only the [Green Party](#) took a clear stance against CETA. The [Conservative Party](#) stressed the achievements of CETA, negotiated under their mandate, while the [election programme](#) of the New Democratic Party (NDP) did not address the EU-Canada agreement as such. The NDP [is reported to be](#), in principle, in favour of free trade with the European Union, in view of Europe's high standards of labour and environmental protection. Still, the NDP shares reservations about investment protection with European centre-left and left political parties.

Investment provisions and investor-state dispute settlement (ISDS)

CETA is among the first agreements negotiated by the EU to contain a fully fledged investment chapter, including provisions on [ISDS](#). Compared to the previous bilateral investment treaties (BITs) concluded by Member States before the entry into force of the Treaty of Lisbon, CETA includes a number of [novelties](#) to reform and reshape investment protection provisions in general and the ISDS mechanism in particular. To name but a few, CETA introduces a code of conduct for and ensures government control over the choice of arbitrators, enhances the transparency of ISDS proceedings, bans frivolous claims and foresees the creation of an appellate mechanism. In the preamble, the EU and Canada explicitly recognise that CETA provisions preserve the domestic right to regulate.

Nevertheless, [persistent opposition](#) to investment protection in general and ISDS in particular has been mounting in civil society in a number of Member States. Considerable opposition, especially with regard to the ISDS mechanism, can be found also in the European Parliament. In its [resolution](#) of 8 June 2011 on EU-Canada trade relations, the Parliament considers that 'given the highly developed legal systems of Canada and the EU, a state-to-state dispute settlement mechanism and the use of local judicial remedies are the most appropriate tools to address investment disputes'.

The Commission carried out an online [public consultation](#) on investment protection and ISDS clauses, submitting 12 questions and a general appreciation of the issue to the general public. The consultation, conducted in the context of the negotiation of the Transatlantic Trade and Investment Partnership (TTIP), took the relevant passages from CETA as a reference. The consultation received some [150 000 replies](#); '(a)most half of the replies contain various negative statements also against CETA, or calls to stop the agreement or calls to exclude ISDS from it'.

The investment court system and CETA

In September 2015, after months of heated debate, the European Commission presented its plans for a new [investment court system](#) (ICS) that 'would replace the existing investor-to-state dispute settlement (ISDS) mechanism in all ongoing and future EU investment negotiations, including the EU-USA talks on a Transatlantic Trade and Investment Partnership (TTIP)'. The Commission [finalised its proposal](#) in November 2015 and formally presented it to the USA. The two are now supposed to resume negotiations on investment protection and the resolution of investment disputes, which were put on hold since March 2014 when the consultation on investment protection and ISDS was launched.

The new ICS, a double instance, '[court-like system with an appeal mechanism](#)', actionable only under specific conditions, composed of publicly appointed judges following transparent proceedings is set to address concerns over earlier proposals on investment protection and ISDS. The Commission expects a 'more cost effective and faster investment dispute resolution system' and foresees preferential rules for small and medium-sized companies (e.g. modifications to the 'loser-pays' principle) in order to make the system more accessible.

In a [letter to European Commissioner for Trade, Cecilia Malmström](#) on 11 November 2015, European Parliament INTA Committee chair Bernd Lange declared he was 'happy to see that the European Parliament's concerns have been taken on board in the Commission's new Investment Court System-proposal', while suggesting some further

changes to the system. Although the Commission currently proposes ICS only for TTIP and other future EU investment negotiations, [the President of the European Parliament](#), [the INTA chair](#) and [other MEPs](#) advocate incorporating an ICS-based system in CETA too.

In a [reply](#) to a European parliamentary question, the Commission pointed out in August 2015 that the negotiations with Canada on the CETA had been concluded in 2014 and that it does not foresee re-opening the negotiations. It rather points to the possible danger that [Canada might retract](#) some concessions made during the negotiations which 'could lead to a downward spiral, ultimately unravelling an agreement that is very good for the EU'. Similar concerns [were voiced](#) by the Canadian side. Still, Commissioner Malmström states she intends 'to discuss with Canada ways to [fine-tune](#)' the approach on investment protection and the resolution of investment disputes 'to take into account more recent developments of the EU debate on the subject'.

During the December 2015 INTA [workshop on CETA](#) she pointed out that this could be addressed within the process of legal scrubbing, and that working towards including (elements of) the ICS system in CETA could either be envisaged immediately or at a later date, via the use of review clauses. Since then, the Commission is reported [not to be pressing for](#) including the entire ICS proposal into CETA.

The Canadian side does not seem to be, in principle, opposed to (elements of) the ICS. However, the new Canadian Government wants CETA to be approved and implemented [as soon as possible](#). Any substantial changes would probably [engender considerable discussions](#) that threaten to delay the process. As at this stage ICS has been primarily conceived as a proposal for TTIP, the Canadian side is not eager to subscribe 'en bloc' to a system that is still likely to be developed further as those discussions go on.

Main references

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